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No. 84-599

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VINTERO CORPORATION,

Petitioner,

—v.—

CORPORACION VENEZOLANA DE FOMENTO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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This brief is submitted on behalf of Respondent Corporacion Venezolana de Fomento (hereinafter "CVF") in opposition to the petition of Vintero Corporation (hereinafter "Vintero" or the "Debtor") for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

COUNTER-STATEMENT OF THE CASE

CVF disagrees with many of the assertions made by Vintero in its Statement of the Case (Vintero Petition pp. 6-15), however, only one of these is relevant to this Petition and deserves mention to this Court. Vintero repeatedly asserts that it and its principal, Vincent deLyra, were "exonerated" from all claims of fraud in the so-called main action commenced by CVF in the Southern District of New York. In fact, there has never been an affirmative finding that no fraud was committed. Rather, the fraud claim failed for lack of proof. Indeed, the Court of Appeals stated in its final decision on the main

case, that "There is little doubt that the transactions in question appear on their face to be highly suspicious." *Corporacion Venezolana de Fomento v. Vintero Sales Corporation*, 712 F.2d 33 (2d Cir. 1983).

In addition, the District Court in its most recent decision following remand by the Circuit Court for consideration of the fraud issue under Venezuelan law, stated:

> "As to deLyra, he is apparently a defendant in a Venezuelan proceeding and as an exercise of international comity . . . this court now *declines to determine his liability* to CVF under Venezuelan law, either as a joint venturer or undisclosed principal in Cariven or for whatever acts he may have performed in Venezuela" (Emphasis supplied).

Corporacion Venezolana de Fomento v. Vintero Sales Corp., No. 76-1671 (S.D.N.Y. Dec. 22, 1982).

I

THE CIRCUIT COURT PROPERLY REINSTATED CVF AS AN UNSECURED CREDITOR

Vintero's argument is based upon a mistaken interpretation of the non-recourse clause, a mis-statement of the relationship between the Appellate Court's decision and the bankruptcy laws, and self-rightous hand wringing about the effect of CVF's reinstatement upon other unsecured creditors (when, in fact, its real concern is that reinstatement of CVF's large claim quashes the Debtor's hope to receive surplus funds from the bankruptcy estate). The issues raised by the Debtor are insubstantial, if not frivolous, and do not merit review by this Court.

For the reasons stated in the Circuit Court's opinion (Appendix B to Vintero's Petition), the reinstatement of CVF as an unsecured creditor of Vintero based upon CVF's residual non-priority contract right to the collateral consisting of the vessel, SS SANTA ROSA, was proper.

The non-recourse clause reads as follows:

> "Anything to the contrary notwithstanding contained in this mortgage herein referred to, the Mortgagor [Vintero] shall in no event be liable for a money judgment in the event of a default hereunder, it being understood that the mortgagee [CVF] looks to the security provided by this mortgage only, and the lien thereof not, however, to be affected in any way."

Clearly, CVF bargained away only its right to satisfy its claim out of the assets of the Debtor other than the SS SANTA ROSA. No claims against the Debtor with respect to the SANTA ROSA were waived or abandoned nor does the clause say anything about bankruptcy.

The phrase "the security provided by this mortgage" refers to CVF's rights in the collateral created by the security agreement, which subsist whether or not the security interest remains perfected.

The Court of Appeals' decision does not violate the priority structure of the Bankruptcy Act of 1898. By classifying CVF as an unsecured creditor, the Court of Appeals relegated CVF to that group of creditors which has no priority of any sort.

Economically, a priority was given to CVF with respect to the Debtor simply by virtue of CVF's reinstatement as creditor, but this is not a priority in a technical bankruptcy sense. As between CVF and the Debtor, CVF will receive proceeds of the bankruptcy estate before any go to the Debtor. Such a result is justified because CVF was the principal source of financing of this project.

Nor did the Court of Appeals infringe upon the bankruptcy principle of equality of distribution (Vintero Petition p. 17). No law or policy prohibits a creditor from agreeing to take less than its full share in bankruptcy. Indeed, the doctrine of freedom of contract relied upon by the Debtor (Vintero Petition pp. 23-24), supports enforcement of such an agreement.

For example, if a debtor has two assets and a creditor holds an unperfected non-recourse security interest in only one of the assets, that creditor, through its non-recourse agreement, has agreed to take less than its full unsecured creditor's share of the bankruptcy estate.[1]

The Debtor attempts to characterize CVF's claim as one for a deficiency based upon CVF's recovery of approximately $230,000 from its perfected security interest on the BONAIRE STAR. The fact is, CVF has two separate (although substantially identical) security agreements, one on the BONAIRE STAR and one on the SANTA ROSA, each securing the full $8 million principal amount of indebtedness plus interest. No claim is now being made by CVF with respect to the BONAIRE STAR security interest, and the claim reinstated by the Court of Appeals relates only to the SANTA ROSA. Thus, CVF is not seeking to recover a deficiency, but is asserting its initial claim against the Debtor arising from the SANTA ROSA security agreement.

No right of any other general creditor is violated by the reinstatement of CVF. It is not disputed that CVF provided approximately $8 million for this project (See Vintero Petition, pp. 8-9). (CVF's claim is for $12 million as a result of interest accrued prior to CVF's payment of Cariven's debt to the banks pursuant to CVF's guaranty). No general creditor has the right to exclude or expect the exclusion of CVF's claim when the only asset in the estate was purchased with funds provided by CVF.

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1 In cases in which the debtor owns more than one asset, the Bankruptcy Court would have to perform a valuation of the non-recourse creditor's claim to give effect to its agreement not to satisfy its claim out of assets other than the collateral specified in its security agreement. This problem does not arise in the present case because Vintero owns only one asset, the SS SANTA ROSA. Nevertheless, in multiple asset cases, the Bankruptcy Court has the power and ability to place a value upon the non-recourse general creditor's claim in order to give effect to the agreement of the parties.

The Debtor's argument that subsequent creditors relied upon the alleged invalidity of CVF's security agreement must fail. There is no showing in the record that any other creditor knew of CVF's SANTA ROSA security agreement, nor that any such creditor took any action in relation thereto. Moreover, a creditor, upon learning of the security agreement, would hardly be justified in assuming that it had no effect whatsoever.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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November 14, 1984

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